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In the Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

STATE OF ALABAMA

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATE OF ALABAMA

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STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether the Federal Unemployment Tax Act, 26 U.S.C. 3301 *et seq.*, requires participating state unemployment compensation programs to cover employees of parochial elementary and secondary schools.

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The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–5a) is reported at 626 F.2d 366. The decision of the Secretary of Labor (App. C, *infra*, 8a–31a) is published at 44 Fed. Reg. 64378 (1979). The recommended decision of the administrative law judge (App. D, *infra*, 32a–46a) is not reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, 6a–7a; App. E, *infra*, 47a–48a) were entered on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Section 3309 of the Federal Unemployment Tax Act, 26 U.S.C. 3309, provides in pertinent part:

(a) State law requirements

For purposes of section 3304(a)(6)—

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are—

(A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c),

* * * * *

(b) Section not to apply to certain service

This section shall not apply to service performed—

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

STATEMENT

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states.[1] A state qualifies to obtain these benefits within a given taxable year, however, only if the Secretary of Labor certifies on October 31 of that year that the state's unemployment compensation program conforms to the requirements of FUTA. 26 U.S.C. 3304(c). See also 29 U.S.C. 49d; 42 U.S.C. 502(a).

Prior to 1976, FUTA permitted qualifying states to exempt from their programs certain types of employ-

[1]Section 3301 imposes a tax on most private employers equal to 3.2% of the first $6,000 of wages paid each employee. 26 U.S.C. 3301. Section 3302, however, authorizes the employer to claim a credit against this tax liability of up to 2.7% of such wages for contributions to an unemployment fund maintained under a qualifying state law. 26 U.S.C. 3302.

ment by nonprofit institutions, including services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

26 U.S.C. (1970 ed.) 3309(b). In the 1976 amendments to FUTA, Congress repealed the third exemption that related to elementary and secondary schools. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat. 2670.

The Department of Labor interpreted the 1976 amendments as requiring the programs of qualifying states to cover employees of all nonprofit elementary and secondary schools, including parochial schools, and notified the states accordingly (App. A, *infra*, 3a). The States of Alabama and Nevada, however, declined to provide such coverage. The States reasoned that in spite of the 1976 amendments, a parochial school is still exempt under the first exemption of Section 3309(b), which applies to a "church" or a church-related "organization *** operated primarily for religious purposes." 26 U.S.C. 3309(b)(1). In addition, the States contended that it would be unconstitutional to require parochial schools to participate in the unemployment compensation system.

The Department thereupon instituted administrative proceedings to determine whether to withhold

certification from Alabama and Nevada for failure to conform to FUTA's requirements. At the administrative hearing, the parties entered into a series of stipulations concerning the operations of Catholic schools in the State of Nevada, and Catholic, Lutheran, and Baptist schools in the State of Alabama. The administrative law judge found that FUTA does not require the states to include parochial schools within the coverage of their unemployment compensation programs and therefore recommended that the Secretary certify that the programs of Alabama and Nevada comply with FUTA (App. D, *infra*, 32a-46a).

The Department of Labor filed exceptions to the recommended decision. The Secretary upheld the exceptions and ruled that FUTA requires the states to provide the coverage at issue (App. C, *infra*, 8a-31a). The Secretary concluded that Congress had intended the 1976 amendments to result in coverage of the employees of all nonprofit schools, including parochial schools (*id.* at 30a). He also rejected the States' contention that this coverage requirement violates the First Amendment (*ibid.*). Accordingly, the Secretary declined to certify that Alabama and Nevada had conformed to the requirements of FUTA (*id.* at 31a).

The States filed petitions for review, which were consolidated in the Fifth Circuit.[2] The court of appeals

[2]FUTA authorizes a state to obtain judicial review of a decision of the Secretary to withhold certification in either the court of appeals for the circuit that includes the state or in the United States Court of Appeals for the District of Columbia Circuit. 26 U.S.C. 3310(a). Following the Secretary's decision, Alabama filed a petition for review in the Fifth Circuit, and Nevada subsequently filed a petition for review in the District of Columbia Circuit. Pursuant to 28 U.S.C. 2112(a), the Nevada review proceedings were transferred to the Fifth Circuit and consolidated

set aside the Secretary's decision, holding that parochial school employees are excluded from FUTA's required coverage under Section 3309(b)(1)(A), which exempts services performed "in the employ of a church * * *" (App. A, *infra*, 1a–5a). The court stated that "[t]here is no question here that the persons performing services in these religious schools fall within the 'in the employ of' language of the statute * * *" (*id.* at 5a). Moreover, the court concluded that the plain meaning of the term "church" requires a definition "as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church" (*ibid.*). Given this disposition, the court did not reach the constitutional question.

REASONS FOR GRANTING THE PETITION

The question presented for review in this case concerning the interpretation of FUTA is identical to that presented in *St. Martin Evangelical Lutheran Church* v. *State of South Dakota*, cert. granted, No. 80–120 (Nov. 3, 1980). Accordingly, this petition should be held pending the disposition of that case.

---

with the Alabama review proceedings. Shortly thereafter, the Fifth Circuit entered an order staying action by the Secretary pending its decision on the merits.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *St. Martin Evangelical Lutheran Church* v. *State of South Dakota*, *supra*, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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DECEMBER 1980

APPENDIX A

In the United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 79-3968

STATE OF ALABAMA, PETITIONER,

v.

RAY MARSHALL, SECRETARY OF LABOR,
RESPONDENT.

No. 79-4032

STATE OF NEVADA, PETITIONER,

v.

RAY MARSHALL, SECRETARY OF LABOR,
RESPONDENT.

PETITION FOR REVIEW OF ORDERS OF THE DEPARTMENT OF LABOR

(SEPTEMBER 8, 1980)

Before COLEMAN, *Chief Judge*, RONEY AND GARZA, *Circuit Judges.*

GARZA, *Circuit Judge:*

The question presented for our determination is whether the Unemployment Compensation Amend-

ments of 1976[1] discontinued the Federal Unemployment Tax Act (FUTA)[2] exemption for employees of elementary and secondary church schools. For an understanding of the present controversy a brief review of the relevant FUTA exemptions is in order.

Prior to 1970, FUTA did not require states' unemployment compensation programs to include nonprofit organizations, such as hospitals and schools, within their unemployment compensation coverage. The Employment Security Amendments of 1970[3] required states' programs to include these organizations within their coverage, but the amendments provided two express exemptions of importance to this case. 26 U.S.C. § 3309(b)(1) provided an exemption for service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

Section 3309(b)(3) provided an exemption for service performed "in the employ of a school which is not an institution of higher education."

In 1976, Congress deleted the exemption contained in § 3309(b)(3) thereby requiring coverage of elementary and secondary schools. Following the 1976 amendments, Petitioners, Alabama and Nevada, modified their compensation laws to delete the corresponding exemptions within their program coverage.[4] After over a year of equivocation, the Secretary of

---

[1] Pub. L. No. 94-566, 90 Stat. 2667.

[2] 26 U.S.C. § 3301 *et seq.*

[3] Pub. L. No. 91-373, 84 Stat. 695.

[4] Ala. Code § 25-4-10(b)(21); Nev. Rev. Stat. § 612.121 (1977).

Labor took the official position that the deletion of § 3309(b)(3) required coverage of services performed in all elementary and secondary schools, including church schools. The Secretary's position was and remains that § 3309(b)(1)(B) has no application to church schools and that § 3309(b)(1)(A) applies only to "those strictly church duties performed by church employees at the school pursuant to their church responsibilities."[5] Alabama and Nevada refused to follow the Secretary's interpretation of the law[6] and the Secretary instituted administrative proceedings to withhold certification of Petitioner's compensation programs. After an evidentiary hearing the Administrative Law Judge determined that the Secretary's position was erroneous and recommended that the Petitioner's programs be certified.[7] Feeling that the term "church" should be narrowly defined to include only the physical house of worship, the Secretary rejected the recommendation of the Administrative Law Judge on October 31, 1979 and the Petitioners now seek review of the Secretary's ruling.

---

[5] Unemployment Insurance Program Letter No. 39-78 (May 30, 1978).

[6] The Alabama Department of Industrial Relations refused to comply with the Department of Labor's directive after having been enjoined to do so as a consequence of litigation of this issue in the state courts.

[7] The Administrative Law Judge relied upon both § 3309(b)(1)(A) and (B) and based his recommendation for certification on several reasons: the "plain language" of the statute; the Congressional intent and history; and the probability of state-church "entanglement". We express no opinion on the various holdings of the Administrative Law Judge, but rest our opinion solely on the "plain language" of § 3309(b)(1)(A).

The Petitioners contend that sectarian elementary and secondary schools remain exempt under the "plain language" of § 3309(b)(1)(A) because the services performed by employees of these schools are performed in the "employ of a church." In support of their argument that church schools are within the statute's meaning of "church", the Petitioners point to the uncontradicted evidence in the administrative record showing that: many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined, and fired by church representatives and officials; school buildings are owned by the church; and school employees are paid with funds drawn from the church accounts. To support their argument that employees of church schools are in fact employees of the church, the Petitioners point to 26 U.S.C. § 3306(a)(1) which defines "employer" and "any person who . . . paid wages." Additionally, 26 C.F.R. § 31.3121(d)-1(c)(2) (1979) explains that an employer-employee relationship exists when the employer has a right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place to work. Lastly, the Petitioners cite many cases which recognize that services performed by parochial schools are an "integral part" of the religious mission of the governing church. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Although both sides of this case point to evidence of Congressional intent favoring their positions, the law is well settled that a statute must be interpreted according to its plain language unless a clear contrary legislative intention is shown. *See NLRB v. Catholic Bishop, supra; U.S. v. Apfelbaum*, ____ U.S. ____ (1980). Regarding § 3309(b)(1)(A), we can find no clear Congressional intention to desire a result contrary to its plain language. The statute plainly indicates that

the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the "in the employ of" language of the statute, therefore, if the employees involved are employed by a "church", the exemption applies to them. Resolution of this question depends upon what is meant by "church" as used in the statute. We are convinced that the plain meaning of "church" requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today.

Petition for Review is GRANTED and the Decision of the Secretary of Labor is hereby SET ASIDE.

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By _____
Deputy

New Orleans, Louisiana
Sep. 30, 1980

APPENDIX B

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-4032

STATE OF NEVADA, PETITIONER,

v.

F. RAY MARSHALL, SECRETARY OF LABOR, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE DEPARTMENT OF LABOR

Before COLEMAN, *Chief Judge*, RONEY and GARZA, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the petition of the State of Nevada for review of an order of the Department of Labor, and was urged by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition

for review of an order of the Department of Labor in this cause be, and the same is hereby granted and the decision of the Secretary of Labor is hereby set aside;

It is further ordered that respondents pay to petitioners the costs on appeal to be taxed by the Clerk of this Clerk.

September 8, 1980

Issued as Mandate: SEP 30 1980

A true copy

TEST: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By _____
Deputy

New Orleans, Louisiana

APPENDIX C

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF
U.S. DEPARTMENT OF LABOR
v.
STATE OF ALABAMA
DEPARTMENT OF INDUSTRIAL RELATIONS AND
STATE OF NEVADA EMPLOYMENT
SECURITY DEPARTMENT

CONFORMITY PROCEEDING

DECISION OF THE SECRETARY

The unemployment compensation laws of the States of Alabama and Nevada must be determined by the Secretary of Labor, by October 31, 1979, to be in conformity with the requirements of the Federal Unemployment Tax Act (26 U.S.C. 3301-3311), hereinafter referred to as FUTA, in order to be certified under section 3304(c) of FUTA and thereby to have those States receive the benefits for themselves and their inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501-504, and FUTA. Such benefits include federal grants for the administration of their unemployment compensation laws as well as tax credits for private employers within the states. The purpose of this proceeding is to determine whether the

Alabama and Nevada unemployment compensation laws are in conformity and/or in substantial compliance with the requirements of FUTA.

The issue is whether FUTA requires State unemployment compensation laws to provide coverage for employees of non-profit church-related elementary and secondary schools. Alabama and Nevada take the position that it does not. It is the position of the U.S. Department of Labor, hereinafter referred to as the Department or USDOL, that the unemployment compensation laws of such States are not in conformity with the requirements of FUTA, and/or that such States are not in substantial compliance with such requirements, because of the lack of such coverage.

Pursuant to the request of the States of Alabama and Nevada, a hearing was held before an Administrative Law Judge, hereinafter sometimes referred to as the Judge, at which an opportunity was afforded to examine witnesses and introduce documentary evidence relating to the issues. Thereafter, parties and interested parties filed briefs and presented oral argument.

On October 11, 1979, the Judge issued a recommended decision in the matter, in which he found that Alabama and Nevada are in compliance with the requirements of FUTA, and he recommended that I so determine.

The U.S. Department of Labor has filed exceptions to the Administrative Law Judge's recommended decision. It contends that the Judge erred in finding that the Alabama and Nevada unemployment compensation laws are in conformity with the requirements of FUTA and that those States are in compliance therewith.

An outline of some of the statutory background would be helpful in the consideration of the issue. During the depression of the 1930's, when unemploy-

ment exceeded 25 percent of the work force in the nation, Congress enacted legislation which was the forerunner of FUTA to provide for the establishment of unemployment compensation programs in the States. Beginning in the mid-1950's, there was a steady expansion of unemployment insurance coverage under the Federal-State unemployment compensation program. For example, originally employers of eight or more employees were covered. In 1954, coverage was extended to employers of four or more employees.

The Employment Security Amendments of 1970 further extended coverage to employers of one employee. In addition, they amended the Internal Revenue Code of 1954 by adding subsections (6)(A) and (B) to the existing section 3304(a), and a new section 3309. The new section 3304(a)(6)(A) required State laws to cover, for compensation purposes, employees of nonprofit organizations and employees of State hospitals and institutions of higher education.

Subparagraph (b) of the new section 3309 permitted the States to exclude, *inter alia*, from the mandatory coverage of nonprofit organizations and State hospitals and institutions of higher education, service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education;

See 84 Stat. 697-698; 26 U.S.C. 3309(b)(1), (b)(2) and (b)(3) (1970).

What followed thereafter is described in the Memorandum of Points and Authorities submitted by the USDOL, hereinafter sometimes referred to as USDOL Memo, at pages 9–11 (footnotes are omitted):

> Even the increasingly expanded Federal-State Unemployment Compensation Program, however, proved inadequate in the 1974-1975 economic downturn. Late in 1974, the Congress passed two remedial laws as temporary measures. The Emergency Unemployment Compensation Act of 1974 (Pub. L. No. 93-573, 88 Stat. 1869) was similar to its predecessor, the Emergency Unemployment Compensation Act of 1971, and further extended benefits for individuals in the regular unemployment compensation programs. The Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845, enacted, in Title II, a Special Unemployment Assistance (SUA) Program. This program was intended to cover an estimated 12 million workers who were not covered by the regular unemployment compensation laws, including state and local government employees, agricultural workers, domestic employees and employees of nonprofit elementary and secondary schools. The SUA program was administered by state unemployment compensation agencies as the agents of the Secretary of Labor, with the federal government assuming the costs of benefits and of program administration.
>
> The SUA program was, in effect, replaced by the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667. These amendments were designed to provide coverage under the permanent Federal-State Unemploy-

> ment Compensation Program for substantially all the nation's wage and salary earners and thereby to eliminate the need for the temporary SUA program. H. R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975). *The 1976 amendments specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools which had been added in 1970 as part of the new § 3309(b) of the Internal Revenue Code of 1954.* (Underscoring supplied.)

The question is whether the 1976 amendment repealing the exemption for nonprofit elementary and secondary schools contained in section 3309(b)(3) of FUTA requires the coverage of church-related schools.

The States of Alabama and Nevada contend, among other things, that under the plain language of section 3309(b)(1) of FUTA (26 U.S.C.3309(b)(1)) church schools are exempt from coverage under FUTA; that the plain language of a statute is controlling unless the legislative history reveals clear evidence of a contrary intent; that church schools are exempt under section 3309(b)(1)(A) because they generally have no separate legal status from their governing church, and because they are an integral part of their governing church; that church schools, and others not technically a legal part of their church, are also excluded from coverage under section 3309(b))(1)(B) because they are operated primarily from religious purposes. Alabama and Nevada argue that the pertinent legislative history does not indicate that Congress intended employees of church schools to be covered under FUTA. It is their position that such coverage would violate the freedoms guaranteed to religious groups under the First and Fourteenth Amendments to the Constitution; that it would involve excessive governmental entanglement in

church affairs, and therefore would be unconstitutional under the tests established by the Supreme Court.

The provisions of 26 U.S.C. 3304(a)(6)(A) and 3309, as amended by the 1976 Amendments, particularly the amendment repealing the exemption for nonprofit elementary and secondary schools provided in section 3309(b)(3), have been interpreted by the U.S. Department of Labor as requiring unemployment compensation coverage of all services performed in the employ of all private nonprofit elementary and secondary schools, including church-related schools, with certain exceptions as provided in 26 U.S.C. 3309(b). In accordance with USDOL's interpretation, the only services performed in church-related elementary and secondary schools recognized as being within the scope of the exemption permitted by section 3309(b)(1) of FUTA, (aside from the permitted § 3309(b)(2) exceptions) are those strictly church duties (as distinguished from school duties) performed by church employees at the schools pursuant to their church responsibilities. (See USDOL Memo, pp. 1-2; Exceptions, pp. 11-13.)

The position of the Department of Labor, as presented on pages 11 through 22 of its Memorandum of Points and Authorities, including the footnotes incorporated therein, is set out below.

I

THE LEGISLATIVE HISTORY OF FUTA SUPPORTS THE DEPARTMENT'S INTERPRETATION THAT ALL CHURCH-RELATED SCHOOLS ARE NOW SUBJECT TO COVERAGE

While FUTA on its face gives little guidance concerning the interrelation between the repeal of the 1970 § 3309(b)(3) school exemption and the retention of the § 3309(b)(1) religious organization

exemptions, its history and remedial purposes militate strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches in Alabama and Nevada (and all other states), within state unemployment insurance coverage.

A. *The Unemployment Compensation Amendments of 1976 represent the culmination of congressional efforts to provide virtually universal unemployment insurance coverage and should be construed in that light*

Since the original enactment of the Federal-State Unemployment Compensation Program, Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments which provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all of the nation's wage and salary earners. H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

This steady progress towards universal unemployment insurance coverage, together with the remedial nature of FUTA, trigger the application of several well-accepted rules of statutory construction, including the requirement that a statute will be interpreted in light of the purposes it seeks to achieve and the evils it seeks to remedy. *Fasulo* v. *United States*, 272 U.S. 620 (1926); *Holy Trinity Church* v. *United States*, 143 U.S. 457-472 (1892). Statutes must be given effect in accordance with the purpose manifested by Congress. *United States* v. *Ohio*, 354 F.2d 549, 555

(6th Cir. 1966)*[13]; *Commissioner of* Internal Revenue v. *Bilder*, 369 U.S. 499 (1962). This directive takes on particular significance in the context of the instant case since remedial social legislation is to be construed liberally in favor of the workers whom it was designed to protect. *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967)*. See also, *United States* v. *Silk*, 331 U.S. 704 (1947); *Phillips Inc.* v. *Walling*, 324 U.S. 490 (1945); *Israel-British Bank (London) Ltd.* v. *F.D.I.C.*, 536 F.2d 509, 513 (2d Cir. 1976). Finally, there is a requirement that remedial legislation be broadly construed and that exceptions be narrowly applied. *Phillips Inc.* v. *Walling*, *supra*, at 493. See also, *Korherr* v. *Bumb*, 262 F.2d 157, 162 (9th Cir. 1958); *Hamblen* v. *Ware*, 526 F.2d 476, 477 (6th Cir. 1975).[14]

B. *Congress intended the unemployment compensation amendments of 1976 to extend unemployment insurance coverage to services performed for all elementary and secondary schools*

In order to properly understand the objective behind the 1976 Amendments, it is necessary to briefly review the 1970 Amendments.

---

[13] The use of an asterisk (*) denotes the leading case in each line of cases cited for a single proposition.

[14] Under an analogous remedial statute, the Fair Labor Standards Act, it has been held that exemptions are to be narrowly construed against the employer *Schultz* v. *Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 67 (5th Cir. 1970). *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S . 388* (1960); *Mitchell* v. *Kentucky Company*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, (1959); *Yogurt Master, Inc.* v. *Goldberg*, 310 F.2d 53, 55 (5th Cir. 1962).

The Employment Security Amendments of 1970, by adding new language in 26 U.S.C. §§ 3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required State-law coverage of individuals employed by nonprofit organizations, including institutions of higher education. The legislative reports which accompany the amendments unmistakably show that Congress was concerned about the need of employees of church-related schools for protection against wage loss resulting from unemployment and intended to bring individuals employed in nonprofit instutitions of higher education, including those operated by religious institutions under program coverage. H.R. Rep. No. 612, 91st Cong., 1st Sess. 11 (1969).

In fact, Congress, quite explicitly limited the availability of the § 3309(b) (1) exemption as applied to institutions of higher education. See H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969), and S. Rep. No. 752, 91st Cong. 2d Sess. (1970) at 48-49.[15] Congress clearly expected that the "operated primarily for religious purposes" language contained in § 3309(b)(1)(B) would be narrowly construed, preventing its application to educational institutions of higher education. The Department of Labor has followed the congressional mandate for coverage of private nonprofit organizations, including institutions of higher education, and consistently interpreted the 1970 Amendments to require State law coverage of *all* institutions of higher education except for the narrow category of seminaries and novitiates.

[15] Congress' references to "separately incorporated" institutions in the reports were clearly examples of the delineation of coverage, and were not intended as a full explanation of the extent of such coverage.

In light of Congress' intention in 1970 to bring religiously affiliated colleges and universities within coverage, and in the face of the Department's subsequent adoption of this interpretation, Congress' description, in 1976, of the objective behind the repeal of § 3309(b)(3) is made even more informative. See H.R. Rep. No. 755, 94th Cong., 1st Sess. 56 (1975) and S.Rep. No. 1265, 94th Cong. 2d Sess. 2 (1976).

Any lingering doubt concerning Congress' desire to extend coverage to *all* elmentary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the anticipated effect of the 1976 Amendments. The Senate Report, S. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of § 3309(b)(3) at 242,000. This figure is essentially identical to the then available best estimate of the total number of employees in *all* nonprofit elementary and secondary schools.[16] Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,00 because the staff of church-related elementary and secondary schools comprise more than half of the staff of all nonpublic elementary and secondary schools in the United States.[17]

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[16] At the September 26, 1979 hearing in this matter it was stipulated between the parties that the 242,000 figure was supplied to Congress by DOL. (Transcript p. 86). Moreover, the testimony of Mr. Louis Benenson at that hearing establishes that the 242,000 figure clearly included all employees of church-related elementary and secondary schools. (Transcript, pp.69–73) See also DOL Exhibits 6–8.

[17] According to the Census Bureau's *Statistical Abstract of the United States* (1977 ed.) there were 261,000 full-time

Thus, in setting forth the projected impact of the repeal of § 3309(b)(3), Congress could only have contemplated that the repeal of § 3309(b)(3) would bring *all* ememtary and secondary schools within FUTA coverage. Considering the total absence of any indication that Congress intended an alternative interpretation, and noting particularly the necessity that the exceptions to coverage be construed narrowly, the Department's construction of the Act is virtually mandatory.

II

THE GENERAL PRINCIPLE OF CONSTRUING STATUTES TO AVOID UNNECESSARY CONSTITUTIONAL DECISIONS IS INAPPLICABLE IN THIS CASE.

The general principle that a court should construe a statute to avoid unnecessary constitutional decisions is inapplicable in this case, because the Department's interpretation that due to the elimination of the exemption formerly provided in 26 U.S.C. § 3309(b)(3), church-related schools are now subject to unemployment insurance coverage is correct in light of the legislative history discussed above and, in any event, does not present any constitutional infirmities. There are two reasons why the Department's interpretation does not give rise to any constitutional problems.

First, unemployment insurance coverage of church-related elementary and secondary schools does not create excessive entaglements. To the contrary, the necessary involvement between such

teachers in the nonprofit elementary and secondary schools in 1975, of which 150,000 were in Roman Catholic schools, pp. 145, 147, tables 235, 237. * * * Compare DOL Exhibits 6–8.

schools and the government would be minimal. While certain records would have to be maintained and determinations of eligibility for benefits would have to be made, there would be no need to become involved in such issues as resolving disputes as to church doctrines in order to resolve claims for benefits. See the testimony of Mr. Bernard Street (Transcript, pp. 107–108). With respect to this point it is noteworthy that the First Amendment does not prohibit all involvement between church and state, but merely entaglement which is deemed *excessive*. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). Moreover, not all procedures for surveillance and auditing result in excessive government entanglement with religion. See, e.g., *Wolman* v. *Walters*, 433 U.S. 299 (1977); *Committee for Public Education* v. *Levitt*, 461 F. Supp. 1123 (S.D. N.Y. 1978). If the surveillance and monitoring occur primarily at the governmental level and do not require interference with the internal operations of the schools, the entanglement is not excessive. *Committee for Public Education* v. *Levitt, supra.*[18] Consistent with the cases just cited, the amount of involvement between government and churches resulting from an adoption of the Department's interpretation of 26 U.S.C. § 3309(b) cannot reasonably be viewed as rising to the level of excessive entanglements.

[18]These very same arguments were recently made on behalf of the Archidiocese of Milwaukee, et al. as intervenors in *Alice Decker, et al.* v. *USDOL, et al.*, E.D. Wisconsin, C.A. No. 78–C–634 in a memorandum in support of the intervenors' motion for reconsideration and amendment of the court's Decision and Order enjoining the state and federal administrators of Title II of the Comprehensive Employment and Training Act of 1973, as amended, 29 U.S.C. § 841, *et seq.* (CETA), from funding CETA positions in church-related elementary and secondary schools.

The second reason why the Department's interpretation of § 3309(b) does not present constitutional infirmities is that, with one exception not here relevant,[19] FUTA does not *mandate* that state unemployment insurance laws deny any individuals unemployment benefits. Thus, while 26 U.S.C. 3304(a)(10) permits the state to provide for the denial of benefits to individuals discharged for misconduct in connection with their work, etc., the state is not *required* to provide for such a denial.[20]

Thus, even assuming, *arguendo*, that the extension of coverage to church-related elementary and secondary schools would result in excessive entanglement as a result of current provisions of state law regarding the denial of benefits for misconduct, etc., the above factor, we submit, precludes a holding that the Department's interpretation of FUTA is facially unconstitutional on entanglement grounds since the Departments interpretation does not necessarily result in the type of entanglements about which Alabama and Nevada are so concerned. It is in this context that it is also appropriate to consider the recent decision in *N.L.R.B.* v. *Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979) in which the court found that the National Labor Relations Act (NLRA) coverage of parochial schools raised "serious constitutional questions" (albeit without finding unconstitutionality). The Court expressed two concerns

[19] Section 3304(a)(6)(A) of FUTA precludes payment of benefits to teachers unemployed between academic terms under certain circumstances.

[20] See section 25-4-78-(3), Code of Alabama 1975, Alabama Exhibit, para. 79, and section 612.385 of Nevada Revised Statutes (1979) and Nevada Exhibit A, paragraphs 40 through 44.

in that case, one of which can be best described as involving the "chilling effect" of mandatory collective bargaining on the ability of clerical authorities to administer their schools and the other relating to the potential problems created by requiring the Board to adjudicate employer/employee disputes in a sectarian school setting. Unlike the situation in the *Catholic Bishop* case, *supra*, unemployment insurance coverate does not necessitate state involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. In fact, the unemployment insurance system would generally only be triggered *after* an employee had been terminated and his or her connection with the school severed.

To the extent that it may be argued that the second area of the Supreme Court's concern regarding unfair labor practice adjudications in *Catholic Bishop*, *supra*, raises some possible parallels with certain aspects of the unemployment insurance system, it must be recognized that these problems arise bacause of state law provisonns and not because of the Department's interpretation of § 3309(b) of FUTA. The point to be made is simply that potential entanglements cannot be used to negate unemployment insurance coverage for former employees since coverage itself does not *inevitably* create any entanglements.

The *Catholic Bishop* case, *supra*, is further distinguishable in that despite coverage by a state unemployment insurance law, the church school employer remains free to employ or not employ any individual it chooses on whatever basis it desires. The only impact of unemployment insurance coverage is that some of these decisions will now

have some financial impact, albeit an impact no greater than that borne by private non-sectarian schools. The concept that the first amendment protects both the practice of religion and also spares one the financial burdens of such practice was rejected in *Braunfield* v. *Brown*, 336 U.S. 559 (1961) where the Court concluded that a statute could not be invalidated on free exercise grounds merely because it made the practice of religion more expensive.

Nor is there any basis whatsoever for DIRSA's [the Department of Industrial Relations of the State of Alabama's] and NESD's [the Nevada Employment Security Department's] apparent belief that employer/employee relations of church-related schools in Alabama and Nevada respectively are constitutionally immune from such impact. Clearly, they can claim no exemption from child labor laws, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) or minimum wage requirements, *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), certiorai denied, 347 U.S. 1013 (1954). Moreover, DIRSA and NESD acknowledge the authority of the government to require and the obligation of church-related schools in Alabama and Nevada respectively to maintain a safe workplace. Alabama Exhibit A, para. 67; Nevada Exhibit A, para. 12.

The right of individuals to send their children to religiously sponsored schools has been established for more than fifty years. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Department seeks no alteration in that principle. The Department's interpretation of § 3309(b) of FUTA will not require an examination into the religious motivations or religious doctrine of church-related

> elementary or secondary schools or in their employment decisions. The Department's position is uncomplicated. Employees of *all* elementary and secondary schools who become unemployed are entitled to coverage. Where such school activities have been performed by the claimant section 3309(b)(1) or the equivalent state law provision is not available as an examption because coverage of elementary and secondary school activity was intended by Congress to protect former school employees from the vicissitudes of unemployment. To conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution.

The Department of Labor takes exception to a number of statements, findings and conclusions contained in the Judge's recommended decision in this proceeding, as well as to his failure to make certain findings of fact. On page 8–10 of the Department's Statement of Exceptions, hereinafter referred to as Exceptions, it states:

> The primary exception which USDOL takes to Part III [of the Judge's recommended decision, on pages 4–5 thereof] stems from the conclusion expressed in the first paragraph of that section to the effect that, since "(e)ssentially all the facts relevant to the issues presented have been stipulated by the parties . . . no recommended findings need be made." While the parties did stipulate as to many facts, additional relevant evidence was introduced at the time of the evidentiary hearing as to which the parties did not stipulate. Specifically, this evidence primarily pertained to both (a) the development by USDOL of the 242,000 figure contained in Senate Report No. 1265, 94th

Cong., 2d Sess. 8 (1976), and which was used to explain the estimated number of additional elementary and secondary school employees who would be covered as a result of the repeal of FUTA §3309(b)(3); and (b) the fact that it is unnecessary to get involved in church doctrine in determining whether a former employee of a church-related school is entitled to benefits. Accordingly, USDOL takes exception to the absence of such recommended findings and urges that the Secretary correct this error by adopting the following findings of fact:

(1) Prior to the enactment of the Unemployment Compensation Amendments of 1976, USDOL, at the request of Congressional staff, prepared an estimate of the total number of employees of all non-profit elementary and secondary schools within the United States. The estimate so prepared was 242,000. Tr., 67–73. DOL Exhibits 6–8.

(2) This 242,000 figure represented a statistical determination of the number of non-profit elementary and secondary school employees who were not covered under FUTA prior to the 1976 Amendments. Tr., 75.

(3) USDOL's 242,000 estimate of the total number of all non-profit (church-related and non-church related) elementary and secondary school employees was furnished by USDOL to staff persons in Congress. Tr., 86.

(4) In determining the eligibility of a former employee of a church-related elementary or secondary school for Supplemental Un-

employment Assistance it is unnecessary to determine that which constituted church doctrine and that which did not. Tr., 104-107.

(5) In determining the eligibility of a former employee of a church-related institution of higher education for unemployment compensation it is similarly unnecessary to resolve church doctrine. Tr., 104-107.

(6) In determining the eligibility for unemployment compensation of a former employee of a church-related school who either voluntarily quit or who was discharged for misconduct it is unnecessary to draw a determination as to what constitutes the actual doctrine of the church. Tr., 108. See also Tr., 126-127 & 136. Rather, the relevant inquiry revolves around the understanding of the parties and the intent of the claimant. Tr., 108 & 122-123.

(7) In an unemployment compensation case the person deciding the case does not establish or try to force any change to an employer's work rules. Tr., 123. Similarly, a hearing officer in such a case cannot order reinstatement of the employee in the event a work rule is found to be unjustified. Rather, the only remedy is the grant of benefits. Tr., 124.

In addition, USDOL takes exception to the generalized summary of the stipulated facts concerning the Roman Catholic, Baptist and Lutheran elementary and secondary schools in that the summary as to each of those groups of church-related schools fails to recognize that such

> schools serve the same basic educational purposes and have the same basic academic structure and courses of instruction as non-church-related elementary and secondary schools. Alabama Exhibit A, para. 33, 34, 45, 46, 66, 67, 71; Nevada Exhibit A, para. 11, 12, 17, 32. Further, this summary fails to recognize that these church-related schools are subject to State and local government fire, health and safety requirements. Alabama Exhibit A, para. 47 & 67.

In my opinion, the above-quoted exceptions of the Department are well-founded and valid. I find that the findings of fact recommended by the Department, numbered 1-7, quoted above, are supported by the record and are proper, and I adopt them as my own.

The Department takes exception to the conclusions expressed by the Judge in part V, pages 7-9 of his recommended decision for several reasons, discussed on pages 13-18 of its Exceptions which are set out below, including the footnotes incorporated therein.

> First, little or no weight should be afforded the three cases cited as precendent in this section. This is so because the USDOL was not a party to either *Trinity Evangelical Luthern Church* v. *Department of Industrial Relations*, Case No. CV 78 500325, Cir. Ct. Mobile County, Alabama (January 27, 1979) or *Roman Catholic Church* v. *State of Louisiana*, No. 219, 660, 19th Jud. Dist. Ct., East Baton Rouge Parish, La. (August 31, 1979), and thus did not have the opportunity to present relevant evidence or even its arguments to those courts. While USDOL was a party in *Grace Brethern* v. *State of California*, Case No. CV 79-93, USDC CD Calif. (September 21, 1979) the decision rendered in that case was simply on plaintiffs' motion for a preliminary injunction. Not

only has there not yet been a final hearing in *Grace Brethern*, but consideration is currently being given to filing an appeal from that interlocutory order.

In any event, with respect to these three decisions, it is important to realize that to a great extent the cases went off on constitutional tangents which, in the present proceeding, are both unauthorized and unwarranted.[7] Moreover, by adopting those three decisions here in their entirety, the Administrative Law Judge has inexplicably exceeded his authority by making conclusions of law as to the constitutionality of USDOL's in-

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[7] See Mr. Streett's testimony at the evidentiary hearing, TR., 103–129, to the effect that in determining a claimant's eligibility for unemployment compensation it is unnecessary for the State to become involved in church doctrine. However, assuming, *arguendo*, that there do exist certain entanglements between covered church-related schools and the State as a result of its administration of its unemployment compensation law, it does not necessarily follow that such State involvement infringes upon the First Amendment rights of church-related schools. See *USDOL's Memorandum of Points and Authorities*, pp. 17–18. See also the decision in *Stewart, et al.* v. *Commissioner*, U.S. Tax Court, No. 1332–78 (July 31, 1979) and *Hatcher* v. *Commissioner*, U.S. Court of Appeals, Tenth Circuit, No. 78–1883 (July 27, 1979). In each of these cases there was a governmental inquiry into the religious beliefs of the taxpayer and of the religious sect in order to determine whether the taxpayer qualified for an exemption on religious grounds from the self-employment tax. In neither case did the court find a First Amendment problem. These cases therefore illustrate that even where there is an inquiry into the religious tenets of a person and/or a particular sect, there is no violation of the First Amendment so long as the provision in question has a secular purpose and it does not foster excessive government entanglement with religion.

terpretation of § 3309 of FUTA. See Rule of Procedure 14 (b). 44 F.R. 47649 (August 14, 1979).

The remaining USDOL exceptions to Part V relate to four "additional comments" contained therein.

With respect to the first additional comment it need only be noted that the Recommended Decision fails to recognize that under USDOL's interpretation of § 3309 of FUTA it is appropriate to first determine the identity of the employing organization in order to determine the applicability of the § 3309(b)(1) exemption and, if the employer may be both a church and a church-related school, to thereafter determine whether the services performed for such employer are church duties or church school duties. If the latter, the § 3309(b)(1) exemption is inapplicable.

The second additional comment essentially states that no reliance should be placed upon the reference in the legislative history to the 242,000 figure previously discussed. USDOL takes exception to this conclusion for the reason that the record reflects the finding stated by Congress that the additional coverage occasioned by the deletion of the old § 3309(b)(3) exemption would amount to 242,000 employees. That number, as evidenced by the record, represented USDOL's best estimate of the total of all (church-related and non-church-related) non-profit elementary and secondary school employees. If any presumption is to be drawn with respect to Congress' understanding of what this figure represented, that presumption must be that Congress considered the testimony and data it received and knew what it said. Any other presumption would be improper. Furthermore, it is apparent from the final sentence of

this second additional comment that the Administrative Law Judge's confusion as to USDOL's position in this case stems from his inability to distinguish between "church functions" and "church-school functions." It is only services related to those latter functions that USDOL contends are covered.

USDOL takes exception to the third additional comment for the reason that the legislative history to the 1976 Amendments to FUTA clearly reflects that Congress intended to extend coverage to all "non-profit elementary and secondary schools" by deleting the exemption previously applicable to such schools. See USDOL's memorandum of Points and Authorities, pp. 11–16. If Congress had intended to limit the extension of coverage to only that small proportion of non-profit elementary and secondary schools which are non-church-related,[8] it is only reasonable that they would have so specified. This inference is strengthened by the fact that coverage of church-related institutions of higher education had been covered since the time of the 1970 Amendments. Even more support for this conclusion can be found in the fact that all non-profit elementary and secondary school employees not otherwise covered by State laws were covered by SUA, and by the fact that the Unemployment Compensation Amendments of 1976 were designed to "eliminate the temporary Special Unemployment Assistance Program" and extend "permanent" coverage to "substantially all the workers . . . covered by SUA." H.R. Rep. No. 94–755 at 17.

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[8] Fewer than 20 percent of the total of all non-profit elementary and secondary school employees are employed by non-church-related schools. DOL Exhibit 1, pg. 1.

> Finally, USDOL takes exception to the fourth additional comment for the reason that there is no support for the conclusion expressed that the Department's construction of § 3309(b) is inconsistent with other governmental interpretations of the term "church" used elsewhere in the Internal Revenue Code. Nowhere in the Internal Revenue Code is there a definition of the term "church" which includes church-related elementary and secondary schools. Not surprisingly, the regulation relied upon as authority for the proposition stated (26 CFR § 1.1508-1) is non-existent.[9]

After considering all the evidence and arguments concerning the issues, it is my conclusion that the views expressed by the Department of Labor in its Memorandum of Points and Authorities and in its exceptions to the Judge's decision are correct, for the reasons and on the basis of the authorities indicated therein. FUTA, as amended by the 1976 amendments, requires State unemployment compensation laws to provide coverage for employees of non-profit church-related elementary and secondary schools. The legislative history of the pertinent statutes shows that Congress intended to cover such schools under FUTA. Settled principles of statutory construction support such coverage, particularly the rules that remedial social legislation should be liberally and broadly construed as to coverage so as to accomplish its purpose and that exemptions from such statutes should be narrowly construed. I believe that covering such schools under FUTA does not create excessive governmental entanglement with religion and is within the limits of government regulation provided by the Constitution.

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[9] If the reference was intended to be to 26 C.F.R. § 508-1(a)(3)(a) it is inapposite since that regulation clearly does not define "church" as including church-related elementary and secondary schools.

Accordingly, I find that the Alabama and Nevada unemployment compensation laws fail to conform to the provisions of the Federal Unemployment Tax Act, as amended. In accordance with the last sentence of section 3304(c) of that Act (26 U.S.C. 3304(c)) I find that those States have failed to amend their unemployment compensation laws so that they contain each of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein, specifically the provision required by reason of the enactment of amendments to section 3309(b) of FUTA. I also find that Alabama and Nevada have, with respect to the 12-month period ending on October 31, 1979, failed to comply substantially with that provision.

Dated at Washington, D.C. this 31st day of October, 1979.

RAY MARSHALL
Secretary of Labor

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR

vs.

STATE OF ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS AND STATE OF NEVADA EMPLOYMENT SECURITY DEPARTMENT[1]

Conformity Proceeding

Howard L. Robinson, Esquire
Carl W. Gerig, Jr., Esquire
Charles Raymond, Esquire
Jonathan Waxman, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C. 20210

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[1] Proceedings against four additional states, Tennessee, Washington, Texas and Michigan, were postponed by agreement of the parties. The following were granted interested party status with rights to submit briefs and participate in oral argument:

Alabama Association of Christian Schools
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Before: WILLIAM A. GERSHUNY Administrative Law Judge

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RECOMMENDED DECISION

This case arises out of the Secretary's interpretation of the 1976 amendment to Section 3309(b) of the Federal Unemployment Tax Act, 26 U.S.C. 3309(b) (hereafter "FUTA"), as requiring extension of unemployment compensation coverage by states to employees of primary and secondary religious schools. Two states, Alabama and Nevada, construe the statutory provision as exempting such schools from coverage and have been determined by the Secretary to be in noncompliance with FUTA. At stake is their entitlement, under 42 U.S.C. 502-504, to millions of dollars annually through Department of Labor grants to pay for the costs of administering their unemployment laws. At issue is whether Congress intended, under Sec. 3309(b) of FUTA, to provide unemployment compensation benefits to employees of such schools and to fund the program on the basis of an excise tax imposed on the religious schools.[2]

For the reasons expressed herein, I conclude that Congress did not so intend and, accordingly, I recommend that the States be certified by the Secretary as entitled to federal grants to pay for the costs of administering their unemployment laws.

I

Procedurally, this case was initiated by the Secretary's filing of a Notice of Hearing on August 10, 1979. The commencement of this proceeding was preceded

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[2] At least one state, California, will continue to receive grant monies for the reason that it is "out of compliance" due to a preliminary injunction issued on September 21, 1979 by the United States District Court for the Central District of California in *Grace Brethren Church et al., v. State of California et al.*, No. CV 79-93.

by the Secretary's formal notification to the States of their non-compliance by letter dated July 6, 1979 and their requests for a hearing on July 16 (Alabama) and 17 (Nevada). The Secretary's Notice scheduled the hearing for September 5, 1979 in Washington, D.C. and established rules of procedure which, *inter alia*, required the issuance of a recommended decision by not later than October 17, 1979 and otherwise forbade the administrative law judge from granting continuances which would prevent the issuance of the decision by that date. By Order dated August 10, 1979, a prehearing conference was scheduled for August 27, 1979 to consider stipulation of the record. In addition, pretrial discovery was preliminarily banned. Over the course of several weeks, under the direct supervision of the administrative law judge, the parties were able to stipulate virtually all the facts relating to the state laws and their impact on church schools and to the organization of Catholic, Baptist and Lutheran church schools and their academic programs. An evidentiary hearing was held on September 26, 1979, briefs submitted thereafter and oral argument heard on October 9, 1979. On September 25, one day prior to the hearing, the Secretary offered to consent to a continuance of the hearing and to certify the states as in compliance in 1979, if the states would agree to such a continuance *prior* to the commencement of the administrative hearing. On the morning of the hearing, four states so agreed and the proceedings involving them were severed and continued generally. Alabama and Nevada's counterproposal to proceed with the hearing so as not to unduly inconvenience the large number of out-of-town counsel and then stay further proceedings was rejected by the Secretary.

Against this procedural backdrop, the states contend that they have been denied procedural due process in that their opportunity for an administrative

hearing was grossly restricted by the Secretary's delay in commencing the proceeding and his requirement that a decision be rendered by the administrative law judge by October 17. Whatever the merits of this contention might be, it is clear that, under the Secretary's *ad hoc* rules of procedure, I lack authority to consider and decide the issue. Rule 4 requires issuance of the recommended decision by October 17 and, the record will reflect, there was no remaining time for discovery or other trial preparation. In any event, there is nothing in this record to reflect that either of the states was deprived of an opportunity to offer evidence which it considered vital to its case.

II

The Federal Unemployment Tax Act (FUTA) had its roots in the fertile fields of New Deal legislation of the 1930's. In its original version, 49 Stat. 620, FUTA imposed an excise tax on "for profit" employers with eight or more employees and, as an incentive for the enactment of State unemployment compensation laws, allowed covered employers a credit against federal tax liability for up to 90% of contributions to a federally approved state program and provided for grants to states with qualifying programs to pay for costs of administration. As a consequence, all states enacted mirror images of FUTA

Coverage was broadened in 1970 with enactment of the Employment Security Amendments Act, 84 Stat. 695, which imposed the tax on employers of one or more employees and redefined employer to include non-profit organizations. Included in the 1970 amendments was a new section 3309 to the Internal Revenue Code of 1954, which nevertheless continued the prior exemption of services performed

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education;

In 1974, to combat a severe economic downturn, Congress enacted a Special Unemployment Assistance Program (SUA), 88 Stat. 1845, which temporarily provided benefits, at the sole expense of the federal government, to employees of non-profit elementary and secondary schools, who were not covered under the regular program. Because such non-profit schools were not subjected to any tax liability under the SUA program, there was no occasion to consider constitutional implications of the legislation.

However, the SUA program soon was replaced by the Unemployment Compensation Amendments of 1976, 90 Stat.2667, which, in relevant part, deleted subsection (3) of Section 3309(b). Construing this amendment as evidence of a Congressional intent to provide permanent coverage to all employees of church elementary and secondary schools (except ministers and those performing strictly church duties in the schools) the Department initiated this proceeding to determine whether Alabama and Nevada, which otherwise construed the amendment, are maintaining a "conforming" unemployment compensation program and, thus, are eligible for massive federal grants.

III

Essentially all the facts relevant to the issues presented have been stipulated by the parties. Because no recommended findings need be made, the facts will be summarized only.

Alabama's initial efforts to provide coverage for employees of church related elementary and secondary schools were enjoined permanently on January 19, 1979, in *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, No. CV 78 500325, Cir. Court Mobile County, and preliminarily enjoined on January 22, 1979 in another suit filed by Baptist and Methodist churches. The State voluntarily dismissed its appeal of the former and thereafter ceased its efforts to compel church schools in Alabama to pay unemployment taxes.

Nevada came into "non-compliance" with its factual determination that Roman Catholic elementary and secondary schools, under the State equivalent of subsection (b)(1), were exempt because services in those schools were performed in the employ of the church or a church-controlled organization operated primarily for religious purposes. For purposes of this proceeding, the Department does not challenge the State's factual conclusions.

Roman Catholic elementary and secondary schools are operated and controlled by the Bishop of the Diocese, have no separate corporate existence, were founded for religious reasons and teach otherwise secular subjects with religious content. Principals are priests, subject to direct control of the appropriate parish priest. Student participation in religious exercises is an integral part of the curriculum. Operating funds are derived principally from church members. Only 3–5% of the lay teachers are non-Catholic. Teachers are employed by the principal and parish

priest, are paid by the Diocese, teach subjects with religious content and perform religious duties, and are subject to discharge for not fulfilling the Church's religious mission.

Baptist churches are tax-exempt corporations whose members are fundamental Bible believers. Its day schools are considered as integral and functional parts of the church, occupy the same facilities as the church, are controlled and supported by the maintaining church. Superintendents are ordained ministers or graduates of religiously oriented colleges. Religious instruction is mandatory, "secular" subjects are taught in conformity with church doctrine, textbooks are published by religious institutions and operating funds are derived from the church budget. Teachers are either ordained ministers or other certified individuals, are hired by the superintendent and paster, are subject to discharge for breach of religious doctrine and must be members of the church.

Lutheran elementary and secondary schools are controlled and operated by the church, which is a tax-exempt corporation. It selects the curriculum and hires and supervises the school staff. The curriculum is similar to that of secular schools. Operating funds are derived by the church and student tuition. Teachers are paid from church funds and school facilities, often located in the church building, are owned by the church. Teachers are subject to discharge for failure to teach church doctrine by word and personal example, both inside and outside the classroom. Religious instruction is required and all subjects are taught in conformity with church doctrine.

If such schools are covered under FUTA, they would be required to maintain employment records, to file periodic reports with the states and respond to individual claims for benefits; would be subject to

periodic examination as to the amount of their contributions and administrative inquiries as to nature and extent of covered services; and would be subject to civil and criminal enforcement procedures. The states would be required to determine whether a claimant was discharged for misconduct or voluntarily left his employment without good cause.

IV

The Department's position in this proceeding is somewhat elusive. On the one hand, it asserts that Congressional deletion of the school exemption in subsection (3) "militates strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches. . ." (Brief p. 11) and that the religious purposes exemption of subsection (1) "is not available as an examption because coverage of elementary and secondary school activity was intended by Congress. . . [and] to conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution" (Brief p. 22). On the other hand, it asserts that subsection (2) exempts ordained ministers and members of religious orders in the exercise of their religious duties in such schools and that the performance of church duties (as distinguished from school duties) by church employees at the schools pursuant to their church responsibilities likewise is exempt under 3309(b)(1). (Brief p. 2)

More specifically, it contends that the words "in the employ of a church" in subsection (b)(1) is intended to refer not to the employing entity, i.e. the religious organization, but rather to the function being performed by the employee, e.g. teaching. The word "church", it argues, refers to the house of worship and not the or-

ganization. Thus, for example, a lay employee of a religious organization teaching religious doctrine at an elementary school conducted by that organization in its house of worship would be covered under FUTA and the exemptive provisions of subsection (b)(1) would be inapplicable.

Its position as to the interpretation of 3309, it argues, raises no constitutional issues because coverage of church schools under FUTA does not create excessive governmental entanglements with the church. In this connection, it contends that neither the program's record-keeping and filing requirements nor its administrative inquiries as to elegibility for benefits would require the government "to become involved in such issues as resolving disputes as to church doctrine in order to resolve claims for benefits" (Brief p. 17).

Not only is the Department's position as to the meaning of section 3309(b) elusive, it has not remained constant. Shortly after enactment of the 1976 amendments, which in part deleted subsection (3) of section 3309(b), the Department formally advised the states that the effect of this change is to mandate coverage of elementary and secondary schools operated by the State and its political subdivisions or by nonprofit organizations" (ALJ Exh. 2, pp. 24–25). Coverage of church schols was not suggested. Thereafter, in a December, 1976 Department memorandum to the states, the following question and answer appeared:

> *Question:*
> Do the 1976 amendments affect church related schools?
>
> *Answer:*
> Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in

> sections 3309(b)(1), (2). . . are still applicable. . . .For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1).

(ALJ Exh, 3, p.5). Having thus affirmed the applicability of the exemptive provisions of section 3309(b)(1) to church schools, the Department went on, in a February, 1977, memorandum to the states, to explain the criteria for determining applicability of the provision:

> Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controllled or principally supported by the church.
>
> The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.
>
> The changes made in section 3309 by P.L. 94–566 do not change the application of the exclusions in section 3309(b)(1)(A) and (B).

(ALJ Exh. 4, pp 6–7). Significant is the Department's interpretation of the words "in the employ of a church" as meaning the "employing organization" and not, as presently contended, the physical structure where religious functions are performed

By April, 1978, the Department tacitly rejected its earlier contemporaneous construction of the 1976 amendments and formally adopted the position asserted in these proceedings (DOL Exh. 1). By memoranda dated May 30, 1978 (DOL Exh. 2) and November 13, 1978 (Alj Exh. 7), the Department advised the states that church related elementary and secondary schools were covered and the exemptive provisions of subsection (b)(1)(A) and (B) have no application to church activities performed in church related elementary and secondary schools "since schools are not churches within the meaning of that section" (DOL Exh.2, p. 2).

The position of Alabama and Nevada, supported by a number of religious organizations, is that church schools, being an integral part of the governing church and fundamentally religious in character, are exempt from coverage under the plain language of section 3309(b)(1)(A) and/or (B). Moreover, they contend that, while the legislative history does not specifically address the status of church schools under section 3309(b)(1), it "plainly indicates" a Congressional intent to exempt all services where the church is the employing entity. And, finally, the States argue that the Department's construction of section 3309(b) is impermissible for the reason that it would render the legislation violative of the First and Fourteenth Amendments to the Constitution under the excessive entanglement doctrine established by the Supreme Court.

V

There is no lack of precedent as to the application of Section 3309(b)(1) to church elementary and secondary schools. In each of the three lower court decisions rendered to date, the Department's position has been

flatly rejected as contrary to the plain meaning of the statute, unsupported by the legislative history and constitutionally impermissible. *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, Case No. CV 78 500325, Cir.Ct. Mobile County, Ala. (January 27, 1979); *Roman Catholic Church v. State of Louisiana*, No. 219,660, 19th Jud.Dist.Ct., East Baton Rouge Parish, La. (August 31, 1979); *Grace Bretheren Church v. State of California*, Case No. CV 79-93, USDC, CDCal (September 21, 1979).

The precise contentions of the Department in this case were advanced by the State of Alabama in *Trinity Evangelical* and by the Department itself in *Grace Bretheren*. There, the courts reviewed the legislative history of FUTA, including the 1976 amendments which deleted the school exemption provisions of (b)(3); examined the teachings of the Supreme Court in *NRLB v. Catholic Bishop*, 99 S.Ct. 1313 (1979) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and considered the potential entanglement by the states in religious activities of the church. Their thoughtful and highly persuasive decisions are adopted here in their entirety, with the following additional comments.

First, a construction of the language "in the employ of a church" which looks to religious function and place of worship, rather than identification of the employing organization, plainly ignores the language employed by Congress not only in the statute itself, but also in its legislative history (H.R.Rept 612, 91st Cong., 1st Sess. 44; "where the employer is the church. . . ."). Moreover, earlier contemporaneous interpretations of the Department's Unemployment Insurance Service, which presumably worked closely with the Congress in the original enactment and subsequent amendment of Section 3309, advised the states that the determination to be made under (b)(1) was the identity of the "employing organization" (ALJ Exh. 4).

Second, the Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data and, admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.

Third, the notion that complete Congressional silence in the legislative history evidences its intent to cover church schools by deleting the school exemption in subsection (b)(3) is unwarranted in the absence of definitive statutory language. Indeed, where, as here, the Congress manifested concern as to the constitutionality of its coverage of state employees in light of a recent Supreme Court decision (S. Rep. 94-1265, 94th Cong., 2d Sess. 8-9), yet failed even to address the more obvious constitutional question as to coverage of church schools, the only permissible inference to be drawn from that silence is that Congress was acutely aware of the limitations of legislative authority and had not the slightest intention of entangling government in church function.

And fourth, the Department's construction of Section 3309(b) is inconsistent with government interpretations of the term "church", as used elsewhere throughout the Internal Revenue Code, to include church schools. See e.g., 26 C.F.R. 1.1508-1. Common sense, if nothing else, dictates that like terms in a statute be given like interpretations in the absence of a clearly expressed Congressional intention to the contrary. Admittedly, no such expression is to be found in the voluminous legislative history of FUTA.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Secretary make a determination that the States of Alabama and Nevada are in compliance with the Federal Unemployment Tax Act and certify each to be entitled to federal grants to pay for the costs of administering their unemployment laws.

WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: October 11, 1979
Washington, D.C.

APPENDIX E

United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 79-3968

STATE OF ALABAMA, PETITIONER,

v.

RAY MARSHALL, SECRETARY OF LABOR,
RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE DEPARTMENT OF LABOR

Before COLEMAN, *Chief Judge*, RONEY and GARZA, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the petition of the State of Alabama for review of an order of the Department of Labor, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition

for review of an order of the Department of Labor in this cause be, and the same is hereby granted and the decision of the Secretary of Labor is hereby set aside;

It is further ordered that respondents pay to petitioners the costs on appeal to be taxed by the Clerk of this Court.

September 8, 1980

Issued as Mandate: Sep 30, 1980

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

v.

STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONSE OF STATES OF ALABAMA AND NEVADA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND MOTION OF STATES OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO 80-120

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QUESTIONS PRESENTED

1. Whether the United States Secretary of Labor erred in interpreting section 3309 of the Federal Unemployment Tax Act to require the extension of state unemployment compensation laws to church elementary and secondary schools, when the plain language of section 3309(b)(1) exempts such schools from coverage, there is no evidence that Congress intended coverage of such schools, and coverage presents serious constitutional problems under the Religion Clauses of the First Amendment.

2. Whether the United States Secretary of Labor's decision requiring the extension of state unemployment compensation laws to church elementary and secondary schools would result in excessive governmental entanglement with religion in violation of the Religion Clauses of the First Amendment.

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IN THE

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RAY MARSHALL, SECRETARY OF LABOR,
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STATE OF ALABAMA AND STATE OF NEVADA
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONSE OF STATES OF ALABAMA AND NEVADA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The United States Secretary of Labor has filed a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. That court set aside the Secretary's ruling that section 3309(b)(1) of the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA"), requires church elementary and secondary school employees to be covered under state unemployment compensation laws. *States of Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980).

Proceedings in this case were instituted when the Secretary of Labor notified Alabama and Nevada pursuant to section 3304(d) of FUTA that he intended to with-

hold certification from those States because they had not extended their unemployment compensation laws to persons performing services in church elementary and secondary schools. Alabama and Nevada contended that FUTA did not require coverage of employees in church schools and that such coverage would violate the Religion Clauses of the First Amendment.

After a hearing held in accordance with section 3304 (c) of FUTA, an Administrative Law Judge of the United States Department of Labor ruled that the Secretary of Labor's interpretation of FUTA was erroneous and recommended that Alabama and Nevada be certified. The Secretary of Labor rejected this recommendation, and Alabama and Nevada sought review in the United States Court of Appeals for the Fifth Circuit pursuant to the review provisions of section 3310 of FUTA. In addition to the States and the Secretary of Labor, participants in the Fifth Circuit proceedings included four major church groups and an organization of church school teachers.

The Fifth Circuit's ruling set aside the Secretary of Labor's decision on the basis that the plain language of section 3309(b)(1)(A) of FUTA exempts from coverage persons performing services in church elementary and secondary schools. 626 F.2d at 369. Citing this Court's decision in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the Fifth Circuit found no clear congressional intention to contradict the plain language of the statute.[1]

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[1] Consequently, the Court of Appeals stated:

> If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But it is not the responsibility or function of this court to perform linguistic gymnastics in

The decision of the Fifth Circuit is in accord with the decisions of the many other state and federal courts [2] that have ruled upon the Secretary of Labor's interpretation, with the sole exception of the decision of the Supreme Court of South Dakota, which held that Congress intended FUTA to cover employees in church elementary and secondary schools and that such coverage would not violate the First Amendment.[3] On November 3, 1980, this Court granted a petition for a writ of certiorari in the South Dakota case. *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit and the decision of the Supreme Court of South Dakota, which this Court decided to review on November 3, 1980, rule upon the same basic issue—the validity of the Secretary of Labor's interpretation of

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order to upset the plain language of Congress as it exists today.

626 F.2d at 369.

[2] *See* Grace Brethren Church v. California, No. CV 79-93 MRP (C.D. Cal., June 2, 1980), *appeal dismissed,* No. 79-3784 (9th Cir., July 21, 1980); Lutheran Church-Missouri Synod v. Bowling, No. 501-78 (Ill. App. Ct., Oct. 1, 1980); Grace Lutheran Church v. North Dakota Empl. Sec. Bur., Civ. No. 9719 (N. Dak., June 20, 1980); Roman Catholic Church v. State of Louisiana, No. 13,541 (La. Ct. App., June 9, 1980); Catholic Diocese v. Labor & Indus. Rel. Comm., No. CV 179-745 cc (Mo. Cir. Ct., Mar. 28, 1980), *appeal docketed,* No. 31780 (Mo. Ct. App., Apr. 28, 1980); Begley v. Employment Sec. Dep't, No. 78-CVS-8531 (N.C. Super. Ct., Mar. 4, 1980) (notice of appeal filed Mar. 6, 1980); Employment Div. v. Archdiocese of Portland, 42 Ore. App. 421, 600 P.2d 926 (1979); Trinity Evangelical Lutheran Church v. Department of Indus. Rel., No. CV 78 500325-Mc (Ala. Cir. Ct., Jan. 29, 1979).

[3] In re Northwestern Lutheran Academy, 290 N.W.2d 845, 848-52 (S.D. 1980).

FUTA's requirements with respect to employees in church elementary and secondary schools. The States of Alabama and Nevada urge the Court to grant the petition for review in this case immediately and, as requested in the motion accompanying this response, to consolidate it for review with the case from the Supreme Court of South Dakota.

The States of Alabama and Nevada make this request, and oppose the Secretary's suggestion that the Fifth Circuit decision be held pending disposition of proceedings in No. 80-120, on the ground that resolution of the important issues raised by the Secretary's interpretation of FUTA will be advanced by full review on the merits of the proceedings from the Fifth Circuit. As more fully explained below, the comprehensive stipulated record of facts underlying the Fifth Circuit's ruling will greatly facilitate determination of the statutory and constitutional issues presented to the Court. In addition, the Fifth Circuit's decision, unlike that of the Supreme Court of South Dakota, is based upon a formal decision by the Secretary of Labor construing the relevant section of FUTA. Review of the Fifth Circuit's decision would bring the Secretary before the Court as a party defending the official administrative interpretation of the federal statute. Moreover, the ruling of the United States Court of Appeals for the Fifth Circuit and the ruling of the Supreme Court of South Dakota address different subsections of the provision of FUTA relevant to coverage of employees in church schools. Review of both rulings would give the Court a more complete understanding of the statutory issues and a fuller basis for its decision.

Alabama and Nevada therefore urge the Court to grant the petition for a writ of certiorari to the Fifth Circuit and to order this case consolidated for review with No. 80-120.

ARGUMENT

The States of Alabama and Nevada agree with Petitioner that the validity of the Secretary of Labor's interpretation of section 3309(b)(1) of FUTA should be resolved by this Court. The Secretary's interpretation requires all states to extend their unemployment compensation laws to services performed in church elementary and secondary schools as a condition to continued certification under FUTA. For states that have not acceded to the Secretary's instructions to cover church schools, hundreds of millions of dollars in federal funds essential to the administration of their unemployment compensation programs have been jeopardized.[4] The eligibility of private employers in these states to literally billions of dollars in tax credits is also at stake.[5] In addition, the decision of the Secretary has spawned litigation in courts across the country by church groups fearful of the effect of the Secretary's interpretation of FUTA. A definitive decision by this Court is clearly necessary to resolve the controversies caused by the Secretary of Labor's position.

In granting the petition for a writ of certiorari in *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120, this Court has already recognized the importance of the issues raised by the Secretary of Labor's interpretation of FUTA. The States of Alabama and Nevada submit that the Court should

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[4] *See* 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504. The Secretary of Labor has instituted administrative proceedings against eight states, in addition to Alabama and Nevada, which have challenged his interpretation of FUTA's requirements respecting church schools. These states are California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin. The proceedings against these states are being held in abeyance by the Secretary pending this Court's determination of the validity of his interpretation.

[5] *See* 26 U.S.C. § 3302.

also grant the petition for a writ of certiorari in the instant case immediately and should consolidate it for review with the case from the Supreme Court of South Dakota.[6] Such action—as opposed to merely placing this case in a "hold" status pending disposition of the South Dakota proceedings, as suggested by the Secretary of Labor—would serve several important purposes.

First, resolution of the important statutory and constitutional issues raised by the Secretary of Labor's interpretation of FUTA would be greatly facilitated by review on the basis of the factual record developed in the case decided by the Fifth Circuit. The statutory issue before the Court—whether services performed in church elementary and secondary schools are within the plain language of section 3309(b)(1)[7]—requires a factual determination of the nature of the relationship among churches, their schools, teachers and other personnel in those schools. The constitutional issue that would be presented for decision if the Court were to adopt the Secretary of Labor's interpretation also requires a factual determination of the potential effect state unemployment

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[6] Alabama's and Nevada's motion for consolidation follows this response in support of the petition for a writ of certiorari. Consolidation of this case with the case from South Dakota would not significantly delay consideration of the latter case. If the Court grants the petition in this case before January 1, 1981, Petitioner's brief would be due no later than mid-February and the brief of Respondents would be due by mid-March. *See* Sup. Ct. Rule 35. Thus, this case could be calendared for argument with No. 80-120, and decided, before the end of this Term.

[7] Section 3309(b)(1) provides an exemption from coverage for services performed:

> in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

compensation laws would have on churches and their schools.

The majc portion of the comprehensive record underlying the decision of the Fifth Circuit was agreed upon by the Department of Labor and the States of Alabama and Nevada in administrative proceedings before the Department of Labor. The record describes in detail the organization and operation of church elementary and secondary school systems of the Baptist, Lutheran and Roman Catholic Churches in Alabama and Nevada. The nature of the relationship between churches and persons performing services in church schools is fully set forth. In addition, the record demonstrates in detail the impact that the Secretary's proposed extension of Alabama's and Nevada's unemployment compensation laws to church schools would have on the operation of churches and their schools. Given the comparatively limited factual findings in the South Dakota case,[8] which involved only two schools of one denomination, Alabama and Nevada believe that the Court's analysis of the issues raised by the Secretary of Labor's interpretation of FUTA would be enhanced by the broad, undisputed record underlying the decision of the Fifth Circuit.

Second, it is appropriate for the Court to review the Secretary of Labor's interpretation of FUTA in a case in which the Secretary participated and issued a formal decision interpreting the relevant statutory provision. FUTA charges the Secretary with responsibility for determining whether states are in compliance with its provisions and establishes special procedures for administrative and judicial review of the Secretary's determinations. 26 U.S.C. §§ 3304, 3310. The Secretary invoked FUTA's procedures in the proceedings against Alabama and Nevada, issued a formal decision embodying the

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[8] *See* Appendix C to Petition for a Writ of Certiorari to the Supreme Court of South Dakota in No. 80-120, at pp. A36-A40.

agency's interpretation of FUTA, and was a party at all stages of the proceedings. In contrast, the South Dakota case arose under provisions of state law when two church schools challenged the state unemployment agency's determination that they were covered by provisions of the South Dakota unemployment compensation statute, which is modeled upon section 3309(b)(1) of FUTA. *See In re Northwestern Lutheran Academy*, 290 N.W.2d 845, 847 (S.D. 1980). The Secretary of Labor issued no decision in that case and did not participate in the proceedings.

The Secretary of Labor contended before the Fifth Circuit that his administrative interpretation of FUTA is entitled to deference, and the same argument likely will be pressed before this Court. Alabama and Nevada submit that in considering the substantial questions arising from the Secretary's interpretation, the Court should have the Secretary of Labor before it as a party defending the formal decision setting forth the agency's position.[9]

Finally, the Fifth Circuit and the Supreme Court of South Dakota interpreted different subsections of section 3309(b)(1) of FUTA, and resolution of the proper interpretation of the statute would be assisted by having both decisions before the Court for review. The Supreme Court of South Dakota ruled that employees working in

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[9] The United States filed a memorandum as amicus curiae supporting the petition for a writ of certiorari in the case from the Supreme Court of South Dakota and can be expected to proceed as amicus curiae on the merits, and to seek leave to present oral argument, in that case. Alabama and Nevada submit that if the United States—Petitioner through the Secretary of Labor in the instant case—is to present oral argument before the Court, in fairness, Respondents Alabama and Nevada should also have this opportunity. Granting the petition for a writ of certiorari to the Fifth Circuit would enable both the United States and the States of Alabama and Nevada to present argument to the Court as parties.

church schools are not within the exemption from coverage provided in section 3309(b)(1)(B) applicable to service performed in the employ of organizations which are, *inter alia*, "operated primarily for religious purposes." [10] The South Dakota Supreme Court did not expressly consider or rule upon the alternative exemption in section 3309(b)(1)(A) for services performed "in the employ of . . . a church or convention or association of churches." The United States Court of Appeals for the Fifth Circuit based its decision on the conclusion that employees performing services in church schools are within the plain language of the latter exemption.[11] Consolidation of both cases for review will thus give the Court a more complete basis on which to consider and decide upon the proper interpretation of FUTA.

CONCLUSION

The Secretary of Labor's decision that FUTA requires state unemployment compensation laws to cover employees working in church elementary and secondary schools raises statutory and constitutional issues affecting every state and major church group in the United States. For

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[10] The South Dakota Supreme Court then considered and decided the issue of the constitutionality of the Secretary's interpretation under the Religion Clauses of the First Amendment. *See* 290 N.W.2d at 849-52.

[11] Another difference between the case from the Supreme Court of South Dakota and the case from the United States Court of Appeals for the Fifth Circuit is that the latter presents the perspective of states which have challenged the Secretary of Labor's interpretation of FUTA. As previously noted, such states and employers within them stand to lose billions of dollars in benefits and tax credits as a result of their refusal to comply with the Secretary's instructions to cover employees in church schools. *See* notes 4-5, *supra*, and accompanying text. Granting a writ of certiorari in the case from the Fifth Circuit will assure that the substantial interests of such states are fully represented.

the reasons set forth above, Alabama and Nevada submit that the Court's consideration and resolution of these important issues would be substantially aided by reviewing the decision of the United States Court of Appeals for the Fifth Circuit in *States of Alabama & Nevada* v. *Marshall.* Alabama and Nevada thus respectfully urge the Court to grant the petition for a writ of certiorari filed by the Secretary of Labor in this case and, as requested in the following motion, to consolidate it for review with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120.

Respectfully submitted,

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IN THE

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No. 80-922

RAY MARSHALL, SECRETARY OF LABOR,
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STATE OF ALABAMA AND STATE OF NEVADA
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF STATES OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

Pursuant to Rules 37.3 and 42 of this Court's Rules, the States of Alabama and Nevada hereby move the Court for consolidation of this case for review with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120. The petition for a writ of certiorari in the latter case was granted on November 3, 1980. The basis for this motion is that the decision of the Supreme Court of South Dakota and the decision of the United States Court of Appeals for the Fifth Circuit rule upon the same basic issue—the validity of the

Secretary of Labor's interpretation of section 3309(b)(1) of the Federal Unemployment Tax Act to require coverage of employees in church elementary and secondary schools under state unemployment compensation laws.

As more fully explained in the foregoing Response of States of Alabama and Nevada in Support of the Petition for a Writ of Certiorari, this Court's joint consideration of the cases from the United States Court of Appeals for the Fifth Circuit and the Supreme Court of South Dakota would advance the resolution of the issues raised by the Secretary of Labor's interpretation of FUTA. Unlike the case from South Dakota, the case from the Fifth Circuit presents a comprehensive stipulated record setting forth key facts regarding school systems of three major church groups. This record would greatly assist in the analysis of the statutory and constitutional questions presented in these cases. Moreover, the Secretary of Labor participated directly in the Fifth Circuit proceedings under the special procedures set forth in FUTA and issued a formal decision embodying the agency's interpretation of the relevant statutory provisions. The South Dakota decision actually construed a provision of state law modeled upon FUTA, and the Secretary neither participated nor issued a decision in the South Dakota proceedings. Thus, consolidation of the cases for review would bring the Secretary of Labor as a party before the Court to defend the agency's ruling.

Finally, the United States Court of Appeals for the Fifth Circuit and the Supreme Court of South Dakota relied on different subsections of the relevant section of FUTA in ruling upon the Secretary of Labor's interpretation respecting coverage of employees in church elementary and secondary schools. Review of both cases together on the merits would thus provide the Court with a fuller basis for interpreting the applicable statutory provisions.

For the foregoing reasons, the States of Alabama and Nevada respectfully request the Court to consolidate this case for review with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120.

Respectfully submitted,

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I hereby certify that three copies of the foregoing Response of States of Alabama and Nevada in Support of Petition for a Writ of Certiorari and Motion of States of Alabama and Nevada for Consolidation with No. 80-120 were served this 9th day of December, 1980, by hand on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for Secretary of Labor Ray Marshall; and by mail, postage prepaid, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent in No. 80-120.

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Supreme Court, U. S.
FILED
DEC 9 1980
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No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

v.

STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM OF STATES OF CALIFORNIA, MICHIGAN, OHIO, OREGON, TENNESSEE, TEXAS, WASHINGTON AND WISCONSIN AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

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QUESTIONS PRESENTED

The States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin as Amici Curiae adopt the statement of questions presented set forth in the Response of States of Alabama and Nevada In Support of the Petition for a Writ of Certiorari and Motion of States of Alabama and Nevada for Consolidation with No. 80-120.

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IN THE

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OCTOBER TERM, 1980

No. 80-922

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

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STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF STATES OF CALIFORNIA, MICHIGAN, OHIO, OREGON, TENNESSEE, TEXAS, WASHINGTON AND WISCONSIN AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

INTEREST OF THE STATES OF CALIFORNIA, MICHIGAN, OHIO, OREGON, TENNESSEE, TEXAS, WASHINGTON AND WISCONSIN AS AMICI CURIAE

The decision of the United States Court of Appeals for the Fifth Circuit from which the United States Secretary of Labor files a petition for a writ of certiorari set aside the Secretary of Labor's ruling that the States of Alabama and Nevada were not in compliance with the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311

("FUTA"). The Fifth Circuit held that the Secretary of Labor erred in interpreting section 3309(b)(1) of FUTA to require that state unemployment compensation laws cover employees in church elementary and secondary schools. *States of Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (1980). The Fifth Circuit's ruling is contrary to the decision of the Supreme Court of South Dakota, which this Court decided to review on November 3, 1980. *In re Northwestern Lutheran Academy*, 290 N.W.2d 845 (1980), *cert. granted sub nom. St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120.

On August 29, 1980, the Secretary of Labor informed the States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin (the "Amici States") that he intended to institute proceedings to withhold certification under FUTA from those States for 1981 as a result of their failure to comply with his interpretation of FUTA regarding coverage of employees in church elementary and secondary schools.[1] After the decision of the Fifth Circuit rejecting his interpretation of FUTA, the Secretary of Labor advised the Amici States that proceedings against them would be stayed because of the likelihood that this Court would determine the validity of the Secretary's position.

If this Court upholds the Secretary of Labor's interpretation of FUTA regarding church schools, it is likely that the Amici States will be decertified under FUTA and as a result will lose hundreds of millions of dollars in federal funds essential to the administration of their

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[1] The Secretary of Labor had previously instituted proceedings to withhold certification from the Amici States for the 1980 certification period due to their failure to follow his interpretation. However, because the Amici States contended that the Secretary had failed to allow them sufficient time for a hearing, the Secretary decided to certify them and institute new proceedings for 1981.

unemployment compensation programs and public employment offices. *See* 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504. In addition, employers within the States may lose billions of dollars in credits against the federal unemployment tax. *See* 26 U.S.C. § 3302. The States thus have a substantial interest in resolution of the issues presented in this case.[2]

SUMMARY OF ARGUMENT

The Amici States agree with Petitioner and Respondents that the Court should grant the petition for a writ of certiorari in this case to resolve the important national issues raised by the Secretary of Labor's interpretation of FUTA regarding coverage for church elementary and secondary school employees. As more fully explained below, Amici States also urge the Court to consolidate this case for review with the case from the Supreme Court of South Dakota, No. 80-120, in order to give the Court a full record for review and a complete basis on which to analyze the statutory and constitutional issues presented by the Secretary of Labor's position.

ARGUMENT

The Amici States agree with both the Petitioner and Respondents in the instant case that the issues presented in this case and in *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120, now pending in this Court, are of great national importance in the administration of the federal-state unemployment insurance program. It is equally clear that there now exists an unequivocal conflict in the decisions in these two cases that can be resolved only by this Court.

The Amici States respectfully request the Court to consolidate this case for full review with No. 80-120. These eight States believe that the extensive record that was

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[2] This Memorandum is being filed pursuant to Rule 36.4 of this Court's Rules.

developed during the administrative proceedings by the Secretary of Labor against the States of Alabama and Nevada, taken in conjunction with the record of the South Dakota case, will provide the Court with a much broader perspective upon which to base a decision. The South Dakota case does not directly involve the question of the proper interpretation and application of FUTA, nor does it involve the question of whether the South Dakota law was in conformity with the federal statute. The case from the Fifth Circuit clearly presents the United States Secretary of Labor's interpretation and application of FUTA, the federal statutory provisions and constitutional issue, and the impact of the Secretary of Labor's ruling, not simply with respect to South Dakota, but with respect to all fifty states.

It is of great importance to these eight States that the issue presented in these two cases be resolved by the Supreme Court. If the Secretary of Labor's interpretation is upheld, it is likely that the state unemployment compensation laws of the Amici States would be held out of conformity with FUTA, which would subject these States to the loss of hundreds of millions of dollars in federal grants for administration of their unemployment compensation laws and public employment offices and would also subject private employers in these States to the loss of billions of dollars of tax credits against the federal unemployment tax. For these reasons, the Amici States have a very substantial interest in the resolution of this issue and we respectfully urge the Court to consolidate these cases for prompt decision.

CONCLUSION

The interests of all affected states in the efficient administration of justice and the avoidance of needless litigation are best served by a prompt decision which considers the records and judicial analyses which are part of the instant case and the case from the Supreme Court

of South Dakota. The States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin therefore urge the Court to grant the petition for a writ of certiorari in this case and to grant the motion of Alabama and Nevada for consolidation with No. 80-120.

Respectfully submitted,

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I hereby certify that three copies of the foregoing Memorandum of States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin as Amici Curiae in Response to Petition for Writ of Certiorari and in Support of Motion of Alabama and Nevada for Consolidation with No. 80-120 were served this 9th day of December, 1980, by hand on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for Secretary of Labor Ray Marshall, and Allen R. Snyder, Esq., Hogan & Hartson, 815 Connecticut Avenue, Washington, D.C. 20006, counsel for States of Alabama and Nevada; and by mail, postage prepaid, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent in No. 80-120.

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No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

v.

STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. FOR LEAVE TO FILE, AND MEMORANDUM AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

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IN THE

Supreme Court of the United States

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MOTION OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

Pursuant to Rules 36 and 42 of this Court's rules, Grace Baptist Temple, Prattville, Alabama (hereinafter Grace) and the Alabama Christian Education Association, Inc. (hereinafter ACEA) hereby move for leave to file the attached amici curiae memorandum in response to the petition for a writ of certiorari previously filed herein by Ray Marshall, Secretary of Labor, and in support of the motion filed by the States of Alabama and Nevada for consolidation with No. 80-120.* ACEA is a non-profit

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* Counsel for Grace and ACEA requested Petitioner and Respondents to consent to the filing of the attached memorandum. The consent of Respondents Alabama and Nevada was granted but, as of the time the instant motion and memorandum were printed, Petitioner had not advised counsel for Grace and ACEA whether consent would be granted.

corporation formed to inform, represent and protect fundamental churches and their educational ministries in the State of Alabama. Grace is a non-profit corporation located in Prattville, Alabama, and a member of ACEA. Grace and ACEA (through its members) participated in the Fifth Circuit proceedings below by filing an amici curiae brief. They also participated in the administrative proceedings that were reviewed by the Fifth Circuit where they were allowed "interested party" status (the approximate equivalent of amicus curiae participation). Their participation was to the full extent allowed, intervention having been denied in both proceedings. With the consent of the parties or the permission of the Court, Amici intend to file an amici curiae brief on the merits in this case. The identities and interests of Amici and the bases for this Motion are explained further in the attached Memorandum.

The issues in the instant case are quite similar to the issues presented in another case already before the Court, No. 80-120, *St. Martin Evangelical Lutheran Church, et al.* v. *South Dakota.* However, the breadth and scope of the records in the two cases are dissimilar and Grace and ACEA, for reasons expressed in the attached memorandum, would show that their interests, and the interests of justice, require that the Court allow the filing of the attached memorandum and grant the relief requested therein.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Should this Court grant the Petition for a Writ of Certiorari to the Fifth Circuit, thereby accepting this case for plenary review of the substantive issues?

2. Should this Court consolidate for review the instant case and *St. Martin Evangelical Lutheran Church, et al.* v. *South Dakota,* No. 80-120?

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OCTOBER TERM, 1980

No. 80-922

RAY MARSHALL, SECRETARY OF LABOR,
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STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

SUMMARY OF ARGUMENT

Resolution of the issues presented in this case will have a tremendous impact on churches throughout the United States, as well as non-church employers and the respective states. However, the two states in the United States with the most at stake are Alabama and Nevada. Only they have been held by the Secretary to be out of conformity with the requirements of FUTA. Should the Secretary's decision be reinstated, they will lose millions of dollars in federal funds. Employers in their states will lose hundreds of millions of dollars in tax credits. No other states face this risk. Alabama and Nevada should be allowed plenary participation in litigation of these is-

sues before this Court, because only they can present the arguments from the perspective of states which have resisted Secretary Marshall's interpretation of FUTA. The Court should accept this case for plenary review and consolidation with No. 80-120. Only then would the Court have presented to it the specific impact on two particular religious schools, as shown in No. 80-120, and the broad perspective of the many churches and denominations, as well as "non-conforming" states, as presented in the Fifth Circuit record.

ARGUMENT AND INTEREST OF AMICI

Grace Baptist Temple (Grace) and the members of Alabama Christian Education Association, Inc. (ACEA) are churches located in the State of Alabama. They are fundamental churches which believe in and obey the Bible as the inspired, literal, sensible and inerrant Word of God. They are predominantly independent Baptist churches, although several other denominations are included. As to the issues presented to the Court herein, their beliefs and practices are identical in all material respects.

Grace and the other members of ACEA operate Christian schools, among their other ministries. The Christian schools are entirely religious in scope, being motivated by religious considerations and maintained solely to accomplish religious objectives. All of their activities are conducted from a Biblical-Christian perspective with a spiritual emphasis.

Grace and the members of ACEA employ persons to supervise or teach in their Christian schools. None of the schools are separately incorporated or otherwise separate legal entities. All persons employed to work in the school ministries are employed by the respective churches and are church staff.

Petitioner, Ray Marshall, the Secretary of Labor of the United States, has asserted that the State of Alabama must collect unemployment taxes from churches which maintain Christian schools in order to be in conformity with the requirements of 26 U.S.C. § 3301 *et seq.*, the Federal Unemployment Tax Act (FUTA).

If Secretary Marshall's position is upheld, Grace and the members of ACEA will be subjected to taxation, contrary to the requirements of FUTA and contrary to their rights under the Constitution of the United States.

Therefore, the Alabama Christian Education Association, Inc. and Grace Baptist Temple, Prattville, Alabama, hereby support the position of the States of Alabama and Nevada urging that the Court accept this case for plenary review and consolidate the case with No. 80-120. ACEA and Grace hereby move on their own behalf that the Court enter an order which: (1) grants the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit thereby allowing plenary review of the decision of that court in *Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980); and, (2) consolidates that case with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120, which this Court has accepted for review.

As grounds for the motion, Amici would show:

1. This case and the South Dakota case involve similar questions, namely the correctness in terms of statutory construction and the validity under the Constitution of the Secretary's interpretation of FUTA. Under FUTA the Secretary purports to require that the states collect unemployment taxes from churches which operate religious schools as a condition to the states' receiving federal financial support for their unemployment compensation programs and federal tax credits for

employers in their respective states. This position has forced many states to attempt to collect unemployment taxes from churches in violation of their rights under the Constitution.

2. The questions are of vital interest to every state, there being millions of dollars of federal funding for state programs lost when the Secretary finds a state out of conformity with the requirements of FUTA. Millions of employers throughout the United States could be adversely affected if their respective states' unemployment compensation programs are held out of conformity with FUTA, because such a holding will cause the employers to lose entitlement to substantial tax credits that are available where the state program is in conformity with FUTA.

3. Amici churches and many other churches and denominational groups which operate religious schools will be directly affected by the outcome either by the collection of millions of tax dollars from them or by the devastating train of legal consequences which will necessarily follow from their refusal, in some cases, to submit voluntarily to taxation of their ministries.

4. In the proceedings below, the Fifth Circuit set aside the Secretary's interpretation of FUTA as erroneous, thereby deciding federal questions in a way in conflict with a state court of last resort. *Compare Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), *with In re Northwestern Lutheran Academy*, 290 N.W.2d 845 (S.D. 1980), *cert. granted sub nom. St. Martin Evangelical Lutheran Church, et al.*, v. *State of South Dakota*, No. 80-120 (U.S., Nov. 3, 1980). Numerous other courts, including another state court of last resort, have rendered decisions in accord with that of the Fifth Circuit and in contrast to that of the Supreme Court of South Dakota. *See, e.g., Grace Lutheran Church* v. *North Dakota Employment Security Bureau*, 294 N.W.2d 767 (N.D. 1980).

5. The case before the Fifth Circuit had the participation as amici curiae of many churches and religious groups, including amici churches herein which are independent, fundamental churches, the Lutheran Church-Missouri Synod, the United States Catholic Conference and the Association of Christian Schools International. These organizations were involved in preparing the stipulated facts which form the basis for the record in the Fifth Circuit, as well as presentations of legal briefs and argument. The record in the Fifth Circuit case therefore presents a broad and widely applicable perspective of the effect upon church-operated schools if the Secretary's position herein is upheld. The South Dakota case involved only two schools and focused on the facts as applied to them only.

6. It would be beneficial to the Court to examine the issues from the broadly based, and more widely applicable perspective as presented in the Fifth Circuit case in addition to the narrowly drawn perspective presented in the South Dakota case, before deciding the questions presented in these cases.

7. Only Alabama and Nevada have been ruled out of conformity by the Secretary. Proceedings were pending against at least eight other states but they were continued due to procedural problems. While the Secretary's decision was set aside by the Fifth Circuit, a contrary ruling by this Court in No. 80-120 could ultimately effect a reinstatement of the Secretary's holding. Should that occur, Alabama and Nevada, but not South Dakota or any other state, will face economic disaster.

CONCLUSION

The need for a complete record and presentation of arguments from the perspectives of all who will be affected, along with considerations of fundamental fairness, require that this Court grant the Petition for a Writ of Certiorari, consolidate this case with No. 80-120 and allow a plenary review of the issues presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David C. Gibbs, Jr., do hereby certify that three copies of the above and foregoing Motion and Memorandum have been served this 9th day of December, 1980, by hand on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for Secretary of Labor Ray Marshall, and Allen R. Snyder, Esq., Hogan & Hartson, 815 Connecticut Avenue, Washington, D.C. 20006, Counsel for States of Alabama and Nevada; and by regular U.S. mail, postage prepaid, on E. Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, Counsel for Petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, Counsel for Respondent in No. 80-120.

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MOTION FILED
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No. 80-422

IN THE

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OCTOBER TERM, 1980

RAY MARSHALL, Secretary of Labor,
Petitioner,

v.

STATE OF ALABAMA and STATE OF NEVADA,
Respondents.

On Motion to Consolidate with Respect to Review if the Court Grants Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION for LEAVE to FILE BRIEF AMICUS CURIAE and BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD As Amicus Curiae in Support of Motion to Consolidate

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QUESTIONS PRESENTED

The Lutheran Church-Missouri Synod agrees that the questions presented are as set forth in the Response of States of Alabama and Nevada in Support of the Petition for a Writ of Certiorari filed with this Court (the "Response"), and it hereby incorporates them herein by this reference.

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No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, Secretary of Labor,
Petitioner,

v.

STATE OF ALABAMA and STATE OF NEVADA,
Respondents.

On Motion to Consolidate with Respect to Review if the Court Grants Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION for LEAVE to FILE BRIEF AMICUS CURIAE and BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD As Amicus Curiae in Support of Motion to Consolidate

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Motion For Leave To File Brief Of The Lutheran Church—Missouri Synod As Amicus Curiae In Support Of Granting Motion To Consolidate.

The Lutheran Church-Missouri Synod respectfully moves the Court, pursuant to Rules 36 and 42 of its Rules, for leave to file the accompanying brief, amicus curiae, in support of granting the motion of the States of Alabama and Nevada to consolidate.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,800,00 individual members. The congregations of the Synod operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Lutheran Church-Missouri Synod has been at the forefront of efforts to challenge the Secretary of Labor's interpretation of section 3309(b)(1)(A) of FUTA through administrative and judicial means. Its experiences in those efforts results in it being one of a relatively few national church bodies that are uniquely qualified to present to this Court the vital issues that are presented in this case. The issues presented in this case touch upon the core of religious liberty and the fundamental interests of the Synod and its congregations.

Therefore, The Lutheran Church-Missouri Synod supports the position taken by the States of Alabama and Nevada that the petition for certiorari be granted immediately and that the case be consolidated for review with the case of St. Martin Evangelical Lutheran Church v State of South Dakota.

Consent To The Filing Of The Attached Brief Amicus Curiae Has Not Been Requested Prior To Filing Due To The Extremely Narrow Time Constraints.

The consent of the parties to the filing of the attached brief has not been sought by The Lutheran Church-Missouri Synod. The petition for Writ of Certiorari was filed at the end of the allowable time for doing so and the Synod has acted to support

the prompt response by the States of Alabama and Nevada. The Synod intents to immediately request consents. If obtained, they will be filed with the Court. Since they might not be granted, the Synod is hereby moving for leave to file the attached brief amicus curiae.

Respectfully submitted,

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BRIEF OF THE LUTHERAN CHURCH—MISSOURI SYNOD

As Amicus Curiae In Support Of Granting Motion To Consolidate

INTRODUCTION

This brief is respectfully submitted by the Lutheran Church-Missouri Synod. The Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant

body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,800,000 individual members. Its congregations operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Synod has been one of the most active of the church bodies which have challenged the validity of the Secretary of Labor's interpretation of the exemption under FUTA which is at issue in this case.

STATEMENT OF THE CASE

The Lutheran Church-Missouri Synod agrees with that Statement of the Case as set forth in the Response of States of Alabama and Nevada in Support of the Petition for a Writ of Certiorari filed with the Court, and it hereby incorporates it herein by this reference.

SUMMARY OF AGREEMENT

The Lutheran Church-Missouri Synod agrees with all of the arguments presented in the Response. It is filing this brief in particular to underscore the importance of one of the positions taken by the States of Alabama and Nevada (Response pages 4, 9). The Lutheran Church-Missouri Synod believes that if the South Dakota Supreme Court decision (as to which certiorari has already been granted) and the Fifth Circuit decision (for which certiorari is being requested) are considered together, it is more likely that the issues presented under the different subsections of the provisions of FUTA relevant to coverage of employees in church schools will be completely understood so that those issues can be dealt with adequately.

ARGUMENT

The South Dakota Supreme Court did not expressly consider or rule upon the exemption afforded in section 3309(b)(1)(A) of FUTA. The Lutheran Church-Missouri Synod and other major church bodies in the United States have stressed the violence done to legislative intent and religious freedoms under the First Amendment by the Secretary of Labor's interpretation of that section as much or more than the exemption set forth in section 3309 (b)(1)(A). The Fifth Circuit decision, and the factual record developed in that case within the administrative proceedings in which the Department of Labor fully participated, provide an excellent basis for knowing and dealing with all the issues created by the Secretary's interpretation.

The real and present impact of the Secretary's interpretation, as well as its potential significance for future issues, is best perceived by a study of what the section 3309(b)(1)(A) exemption would be if the Secretary would have his way! In place of the legislatively enacted exemption as to service performed "in the employ of . . . a church or convention or association of churches," the Secretary would provide a bureaucratically imposed exemption only as to service performed by employees "engaged in *strictly church duties performed . . . pursuant to . . . religious responsibilities.*"[1] The Lutheran Church-Missouri Synod, in cooperation with its 6,200 congregations and their 2,800,000 individual members, has been responsible for administrative and judicial actions challenging the application of FUTA to its churches with schools in approximately twenty states, has been successful in the federal or state courts in four

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[1] Letter from Secretary of Labor Ray Marshall to the Most Reverend Thomas C. Kelly, General Secretary, United States Catholic Conference (April 18, 1978).

states[2], and has cases pending in the federal or state courts in an additional eight states. The Synod had been genuinely alarmed by being told by the Secretary of Labor that the elementary and high schools, operated as integral parts of its congregations in carrying out their programs of mission and ministry for 140 years, are not a part of the church and, therefore, are not entitled to the statutory exemption. The Synod, as well as other church bodies, provided information which became a part of the record considered by the Fifth Circuit in dealing with all of the issues raised by the Secretary of Labor's interpretation. Granting the petition for review immediately and consolidating review of the Fifth Circuit decision with review of the South Dakota Supreme Court decision would substantially aid in resolving these important issues.

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[2] Grace Brethren Church and The Lutheran Church-Missouri Synod v. California, No. CV 79-93 MRP; Trinity Evangelical Lutheran Church v. Department of Industrial Relations, No. CV 78 500325-Mc (Ala. Cir. Ct., Jan. 29, 1979); Grace Lutheran Church v. North Dakota Employment Security Bureau, Civ. No. 9719 (S. Dak., June 20, 1980); Lutheran Church-Missouri Synod v. Bowling, No. 501-78 (Ill. Appl Ct., Oct. 1, 1980).

CONCLUSION

For reasons set forth in the Response, as to one of which The Lutheran Church-Missouri Synod has herein placed emphasis, it is respectfully urged that the Court grant the requested petition for writ of certiorari filed by the Secretary of Labor and that it also consolidate it for review with the case of St. Martin Evangelical Lutheran Church *et al* v. State of South Dakota, No. 80-120.

December 8, 1980

Respectfully Submitted,

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